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CFPB Issues Proposal to Limit Overdraft Fees at Large Banks, Treat Overdrafts as Credit Product

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On January 17, 2024, the Consumer Financial Protection Bureau (CFPB) issued a notice of proposed rulemaking that would treat discretionary overdraft services offered by banks with more than $10 billion in assets as credit, bringing them for the first time under Regulation Z, the implementing regulation of the Truth in Lending Act. As a result, such products would be treated like credit cards, with consumers utilizing overdraft services receiving new disclosures and being evaluated for their ability to repay the obligation. However, the proposed rule would create an exemption for "courtesy" overdraft services – which are services where the overdraft fee covered only the break-even cost of the service or fell within a CFPB-prescribed break-even cost.

The CFPB is requiring comments on the proposed rule by April 1, 2024, and hopes that a final rule will take effect by October 1, 2025.

Under proposed rule, large banks would need to significantly revise discretionary overdraft services fees or be subject to fee cap

Overdraft fee restrictions

The CFPB proposes to amend Regulation Z to include overdraft services offered by large banks, unless they are provided at or below costs and losses and, as referred to by the CFPB, as a "true courtesy" to consumers. Large banks seeking to rely on the courtesy exemption could do either of the following:

- Calculate the fee by analyzing their own costs and losses.
- Rely on the benchmark fee set by the CFPB.

The CFPB indicates it is considering a benchmark fee of $3, $6, $7 or $14, but did not specifically identify the amount and seeks comment on the appropriate benchmark.

Large banks offering overdraft services priced above either the calculated costs or the benchmark fee would be deemed to have offered credit subject to a finance charge. As a result, these services would be subject to a host of Regulation Z requirements – including with respect to advertising, periodic statement delivery and account opening disclosure requirements. The proposal would treat transfer fees and other related charges as finance charges imposed in connection with an overdraft credit feature.

Overdraft accounts

The CFPB also proposes to require large banks to place overdraft services in a credit account separate from the asset account. These accounts would be subject to the open-end credit provisions of Regulation Z. Overdraft services accessible by debit card also would be subject to the restrictions of the Credit Card Accountability Responsibility and Disclosure Act of 2009 – such as the ability to pay provisions, rate reevaluation requirements, first-year fee restriction, payment allocation provisions, prohibition against declined transaction fees and penalty fee restrictions. Overdraft accounts also would be subject to the Equal Credit Opportunity Act and Regulation B, meaning the CFPB could examine overdraft practices for potential discrimination in the administration of the accounts.

Overdraft repayment methods

Finally, large banks would be subject to the compulsory use provision under Regulation E, which prohibits requiring consumers to use preauthorized electronic fund transfers for repayment of overdraft credit. As a result, large banks could not condition the provision of overdraft services on the consumer's agreement to permit automatic payments from the consumer's checking account. While a consumer may still be given the choice to

opt into automatic payments, the proposal would allow consumers to use at least one alternative method of repayment.

Interplay with Regulation E

Regulation E (Electronic Fund Transfer Act) currently provides that the term “overdraft service” does not include any payment of overdrafts pursuant to a line of credit subject to Regulation Z –including transfers from a credit card account, home equity line of credit or overdraft line of credit. The proposed rule would provide that covered overdraft credit, which includes the break-even overdraft services offered by large banks described above, is not an overdraft service under Regulation E because it is a credit subject to Regulation Z. Accordingly, if large bank consumers are offered covered overdraft credit, that covered overdraft credit would not be subject to the Regulation E overdraft service opt-in requirements.

What’s next?

As noted above, the CFPB is requesting comments on the proposal by April 1, 2024, and hopes a final rule will take effect by October 1, 2025. If implemented, the rule would undoubtedly change the manner in which large banks offer and administer overdraft programs. Although the CFPB excluded banks with under $10 billion in assets from the rule, the proposal lays bare the bureau’s policy priorities around deposit-related fee assessment, and all parties – particularly small banks and neobanks – should take note of the concerns the CFPB seeks to address through this rulemaking.

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